In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 212

WILLIAM R. THORSEN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition.

The case arises under Section 201 (a) and (b) of the Revenue Act of 1921, which is set forth in the Appendix, *infra,* p. 4.

The question presented is whether, for the purpose of fixing the taxable status of a dividend declared and paid in 1923, losses incurred in 1915 and 1916 should be used to reduce the 1913 surplus or the profits accumulated from 1917 to 1923.

The Circuit Court of Appeals ruled that losses incurred subsequent to February 28, 1913, are

chargeable against preexisting surplus and are not to be regarded, for the purposes of the statute, as suspended to be paid out of later possible profits (R. 84–93; 65 F. (2d) 234). The court below, in so holding, affirmed the majority decision of the Board of Tax Appeals (R. 50–63; 24 B.T.A. 480).

The decision below presents a direct conflict with that of the Circuit Court of Appeals for the Seventh Circuit in *Canfield* v. *Commissioner,* 62 F. (2d) 751. The *Canfield case* involved another stockholder of the same corporation, and the two cases were consolidated for hearing and decision before the Board of Tax Appeals. The decision of the Board was reversed in the *Canfield case* and affirmed in the instant case. In addition to the clear conflict, the importance of the question is admitted by both parties, and is one of the grounds relied upon by the Commissioner of Internal Revenue in the petition for writ of certiorari in the *Canfield case,* No. 158, this term. This petition was not opposed.*

While we concede the desirability of review by the Court, we believe the case to have been correctly decided below. The reasoning in support of the conclusion is so clearly and ably stated by

*After the time for filing a brief in opposition, as governed by the rules of this Court, had expired and after this memorandum went to print, a "Reply Brief" was filed to the petition in the *Canfield* case. This brief concedes the conflict between the *Thorsen* and *Canfield* cases. It does not question the importance of the issue or the desirability that it be reviewed by this Court.

the Circuit Court of Appeals that it is believed no further exposition of our views is necessary at this point.

An early determination by this Court of the question presented will greatly facilitate the administration of the revenue laws and will undoubtedly forestall considerable litigation in the future.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

AUGUST 1933.

APPENDIX

STATUTE INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 228:

SEC. 201. (a) That the term "dividend" when used in this title (except in paragraph (10) of subdivision (a) of section 234 and paragraph (4) of subdivision (a) of section 245) means any distribution made by a corporation to its shareholders or members, whether in cash or in other property, out of its earnings or profits accumulated since February 28, 1913, except a distribution made by a personal-service corporation out of earnings or profits accumulated since December 31, 1917, and prior to January 1, 1922.

(b) For the purposes of this Act every distribution is made out of earnings or profits, and from the most recently accumulated earnings or profits, to the extent of such earnings or profits accumulated since February 28, 1913; but any earnings or profits accumulated or increase in value of property accrued prior to March 1, 1913, may be distributed exempt from the tax, after the earnings and profits accumulated since February 28, 1913, have been distributed. If any such tax-free distribution has been made the distributee shall not be allowed as a deduction from gross income any loss sustained from the sale or other disposition of his stock or shares unless, and then only to the extent that, the basis provided in section 202 exceeds the sum of (1) the amount realized from the sale or other disposition of such stock or shares, and (2) the aggregate amount of such distributions received by him thereon.

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